Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

NASRIN AFJEH — PETITIONER

vs.

ILLAGE OF OTTAWA HILLS — RESPONDENTS

On Petition For A Writ Of Certiorari
To The Court Appeals Of Ohio, The Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

Nasrin Afjeh, Pro Se
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Toledo, Ohio 43606
(419) 531-3729

NO COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether an ordinance restricting the size of a sign on residential property to 10 square foot, to promote safety and aesthetics discriminate in violation of the first amendment by exempting sign on commercial property and flags and governmental insignias from the 10 square foot limitation at the expense of safety and aesthetics.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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[ ] reported at
_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Appeals of Ohio, Sixth Appellate District, appears at Appendix B to the petition and is
[ ] reported at
_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Common Pleas, Lucas County, Ohio, appears at Appendix C to the petition and is
[ ] reported at
_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

The date on which the highest state court decided my case was May 25, 2005. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ on _____ in Application No. ___A_____.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment of the United States Constitution

Fourteenth Amendment of the United States Constitution

STATEMENT OF THE CASE

The Village of Ottawa Hills filed an action against Nasrin and Abdollah Afjeh, residents of the Village, asking for a declaratory judgment of the constitutionality of the Village sign ordinance and an order directing the Afjehs to remove existing signs on their property. The Village sign ordinance at Section 6 of Ordinance No. 96-20 provided:

> Signs erected after the effective date of this ordinance on residential property:
>
> 1) Shall not exceed 48" in height
> 2) Shall not exceed 10 square feet in total square feet of all signs
> 3) Shall be located not nearer than 25 feet from the intersection of 2 streets
> 4) Shall not be located in the public right-of-way

5) Shall not be lighted in any manner

The Village alleged, and the trial court found, that Nasrin Afjeh erected a sign that exceeded 10 square feet in area and 48 inches in height in violation of Ordinance 96-20. Opinion and Judgment Entry, 2, October 28, 2002. The sign read: "Welcome to Ottawa Hell – We still got Kakistocracy." Id. at 3-4. The word "kakistocracy" means government by the worst men in the state. Webster's Encyclopedic Unabridged Dictionary of the English Language, 778, (1989). The court found that the sign expressed Nasrin Afjeh's "disdain""for the Village," and "its officials." Opinion and Judgment Entry, 3, October 28, 2002.

Nasrin Afjeh erected the sign to protest the harassment to which Village officials subjected her. The sign followed a series of retaliatory actions against her by agents and employees of the Village. It all began in 1997 when Nasrin began a campaign, unpopular with Village officials, to oppose a school levy that was going to be voted on by village residents in the election in November 1998. In September

1998, two months prior to the vote on the levy, Nasrin filed a lawsuit against the Village under the Ohio Public Records Act to uncover records of ordinances and resolutions showing how much money the Village had wasted by giving the money to the Ottawa Hills School Board. Trial transcript, p. 299, June 26, 2002. Nasrin's participation in this effort was well known by Village officials, who were very supportive of the levy and the Ottawa Hills schools. The levy was defeated on November 3, 1998.

Nasrin produced evidence that village official, Marc Thompson, after the levy defeat and some time in December, 1998, filed a criminal complaint in the Toledo Municipal Court alleging that Nasrin violated a Village ordinance prescribing planting shrubs in the public right-of-way. TR June 26, 2002, p.296, line 23, p. 297, line 15. Thompson filed criminal charges only against Nasrin Afjeh, not her husband. Only Nasrin opposed the levy. Thompson, never before nor after, filed such charges against any other village resident. Nasrin won the criminal case on appeal.

After her victory in the Court of Appeals, Nasrin painted a sign on her garage that said, "Welcome to Ottawa Hell – We still got kakistocracy." Her intent was to let the world know that village officials were harassing her.

Then, Village Manager, Marc Thompson sent Nasrin and Abdollah Afjeh a letter informing them that the sign violated a village ordinance. Thompson threatened to take them to court. Defendant Exhibit C). Thompson then filed the instant action in the Lucas County Court of Common Pleas even though no such action was filed against anyone else. For example, Ottawa Hills High Schools put up signs that violated the sign ordinance, but the government did not act to remove them even though they were clearly in violation. Trial transcript, Councilman Straub testimony, p. 43, line 11. Later the schools were given a verbal variance for large A-frame signs that violated the sign ordinance but the petitioner was denied same. Trial transcript, p. 134, line 9, of Thompson testimony.

After Nasrin erected the sign, for the second time, Marc Thompson went to the Toledo Prosecutor Office to initiate criminal charges against the Afjeh's. The Prosecutor declined to prosecute. Thompson never tried to initiate a criminal action for violation of the sign ordinance against anyone other than Nasrin Afjeh. Trial transcript, Straub testimony, p. 21, line 19.

The village then filed an action for declaratory judgment in the Lucas County Court of Common Pleas asking for a declaration of the validity of the village sign ordinance and an order directing Nasrin to remove her sign. But, while the Afjeh's were subjected to lawsuits, the village gave variances given to other residents even when in violation of ordinance. Youngen testimony, p. 97 line 17. Also, p. 99 line 18. The Afjeh's next door neighbor was granted a variance by the Ottawa Hills Village Council for a sign that violated the size requirements and was erected without a permit. Police giving warning for parking petitioner's car on grass but not to others. Trial transcript, June 26, 2002, p. 301, line 12,

The reprisals continued when the Village vigorously prosecuted Nasrin when she planted trees in front of her property. The Village initiated criminal prosecution against the petitioner for planting shrubs, which happened to be more than ten feet from the street but less than two feet in the public right-of-way as a means of retaliation against her, to intimidate and silence her, because of expression of her political views and her brand of political activity. While other residents have planted shrubbery in the right of way, the Village government did not take any action against them. The Village did not file complaint against Mrs. Afjeh's husband but only against her to retaliate against her.

The Village filed a civil action for declaratory judgment in the Court of Common Pleas of Lucas County, Ohio, seeking a determination that Petitioner's sign exceeded the height and size limitations in village Ordinance violated the sign ordinance and that the ordinance was enforceable against Petitioner. Decision and

Judgment Entry of the Court of Appeals for the Sixth Appellate District, 2, December 30, 2004.

The Afjehs countered the Village claim by alleging that the 48" height restriction was unconstitutionally vague and, further, that the Village enforcement aimed to restrict the Afjehs' viewpoint in that Nasrin was "being singled out because of her sign's message." Opinion and Judgment Entry, 5-6, October 28, 2002.

With respect to the height limitation, the trial court ruled in favor of the Afjehs by finding that the height restriction, in failing to specify whether to measure from the top of the sign to the ground or to the bottom of the sign, was "not sufficiently definite to allow a person to determine what conduct violates the ordinance or to prevent its arbitrary enforcement." Id. at 6, citing *Village of Kelley's Island v. Joyce* (2001), 146 Ohio App. 3d. 92, 97. The court ruled that the unconstitutional height limitation was severable from the other "constitutional" provisions of the Ordinance. Opinion and Judgment Entry, 7-8, October 28, 2002.

With respect to the size limitation, the Afjehs pointed out that the Ordinance prohibits signs in residential districts that exceed ten square feet, while allowing signs in commercial districts that exceed 10 square feet but do not exceed 20 square feet. Ordinance 96-20, Section 5(D) provided:

> Signs on commercial property…
>
> D) No sign on commercial property may be:…
>
> 4) Shall not exceed 20 square feet in sign area for all signs, ….

The same ordinance contains no restrictions on the size of flags. Ordinance 96-20, Section 2(2) excepts from the definition of "sign," and, consequently, excepts from the limitations of the ordinance, "Flags and insignia of any government, except when displayed in connection with commercial promotion." Flags can be enormous without violating the ordinance. Village of Ottawa Hills Ordinance 96-20, Sections 5(D)(4), 6, and 2(2), effective Dec. 16, 1996.

The trial court ruled that Ordinance 96-20 was "enacted for the purpose of protecting public health, safety and morals of individuals; to regulate signs to support and complement land use objectives; and to control the appearance and protect the aesthetic quality of the community and property values within the Village." Id. at 5; Section 1, Ordinance 96-20. The court approved its use of a rational relationship test, stating, "State and municipal governments may reasonably regulate activity in this regard as long as the restriction is viewpoint neutral, and, is related to a legitimate governmental purpose. Opinion and Judgment Entry, 5, October 28, 2002. The court further stated that Nasrin's claim that she was being singled out was an assertion made without documentation or proof. The court further supported its conclusion of the viewpoint-neutrality of the Ordinance by pointing out that a councilman and the mayor had assured Nasrin that if "she brought the sign into conformity with the Ordinance, and with the exact same wording, this case would be effectively over." Opinion and Judgment Entry, 5, October 28, 2002.

Following the trial court ruling, Nasrin Afjeh appealed to the Sixth District Court of Appeals. That court upheld the trial court and ruled that that the 10 square foot size limitation was not content-based and thus not subject to strict scrutiny. The court found the ordinance to be a reasonable restriction, narrowly tailored to serve a significant governmental interest, without specifying the interest. Sixth District Court of Appeals Decision and Judgment Entry, 8, December 30, 2004.

The Ohio Supreme Court dismissed Nasrin's appeal from the Sixth District Court of Appeals without opinion. It is to that court and in regard to that ruling that petitioner requests The United States Supreme Court to issue the writ of certiorari.

REASONS FOR GRANTNG THE PETITION

Village of Ottawa Hills Ordinance 96-20, on its face, allows display of flags and insignia of any government of any size in residential and commercial districts and prohibits all other signs

exceeding ten square feet in a residential district and twenty square feet in a commercial district. The ordinance discriminates against residential sign displayers not on the basis of time, place and manner, but on the basis of the message or content. The ordinance offers no justification for allowing larger signs for flags and government insignia. This is discrimination on the basis of content, rather than how it is communicated, without sufficiently compelling justification in violation of the First Amendment and Fourteenth Amendments to the Constitution of the United States.

Case law supports appellant's argument. In North Olmstead Chamber of Commerce v. City for North Olmstead, 86 F.Supp. 2d 755 (2000), the court held unconstitutional a municipal sign ordinance that sought to achieve the interests of safety and aesthetics by content-based restrictions that allowed favored speakers larger signs and less favored smaller signs. The court reasoned that the city had not shown why the ordinance exemption of public facility signs that are not

limited in size are any less distracting and thus unsafe or more aesthetically appealing than signs smaller signs.

The North Olmstead ordinance also banned pole signs except pole signs of official public notices and the flag, emblem or insignia. The court labeled the ban as a content-based restriction, saying, "These arguments do not save the City's content-based pole sign ban. The City's rationale for the ban are safety and aesthetics. It cannot be said that the government's pole signs- whether they are for the city recreational complex or city hall – are somehow less distracting or more pleasing to the eye than the pole sign of a private individual or business." Id. at 54-55.

Petitioner, the owner of a home in a residential district in the Village of Ottawa Hills, erected a sign exceeding ten square feet on her property. The sign criticized Village government by saying, "Welcome to Ottawa Hell - We still got Kakistocracy." Opinion and Judgment Entry of the Lucas County Court of Common Pleas, 4, effective October 28, 2002. The word "kakistocracy" means

government by the worst men in the state. Webster's Encyclopedic Unabridged Dictionary of the English Language, 778 (1989).

The Village sued to remove the sign for violation of, among other things, the 10 square foot size limitation. The courts below treated the Village ordinance as a content-neutral. This cause presents a critical issue for the local government regulation of the first amendment rights of residents of the State of Ohio whether a municipality can favor certain speakers by making exceptions in the ordinance controlling the size and the height of a sign by carefully crafting the wording of an ordinance that allows certain noncommercial speech (churches, schools, and government) more privilege over others noncommercial speakers (private citizens). In addition, this case presents the use of government might, as described above, to intimidate a private citizen in order to stifle her speech.

CONCLUSION

The Village of Ottawa Hills Ordinance 96-20 permitted size and height above the ground of signs are discriminated based on the sign use and is a content-based regulation of speech. sign ordinance. The regulation favors certain signs classified as "commercial" signs by permitting a larger sign area and a greater height above the ground level that those classified as "residential" signs even when both may be located in the same zone. This disparate treatment is in violation of the First Amendment Fourteenth Amendment of the United States Constitution and is thus should be declared void. Regulation of signs particularly on private property is of profound importance impacting cherished liberties citizen enjoy. The influence of a ruling on this case will have a nationwide impact in all communities, small or large, and will provide guidance and clarification on limits that government can legitimately impose on First Amendment rights.

Respectfully Submitted,

NASRIN AFJEH

Nasrin Afjeh, Pro Se Petitioner

August 23, 20[illegible]

The Supreme Court of Ohio

Village of Ottawa Hills	Case No. 05-335
v.	
Abdollah Afjeh, et al.	ENTRY
[Nasrin Afjeh]	Decided: May 25, 2005

Upon consideration of jurisdictional memoranda in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Lucas County Court of Appeals; No. L021364)

s/_____
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Village of Ottawa Hills	Court of Appeals No. L-02-1364
Appellee	Trial Court No. CI-01-4739
v.	
Abdollah Afjeh, et al.	**DECISION AND JUDGMENT ENTRY**
Appellants	Decided: December 30, 2004

* * * * *

William S. McCready, for appellee.

Nasrin Afjeh, pro se.

* * * * *

LANZINGER, J.

Nasrin Afjeh, pro se, appeals the decision of the Lucas County Court of Common Pleas that found the size requirement of the village of Ottawa Hill's sign ordinance to be constitutional and ordered the

removal of the sign painted on her garage door. Because the village's size requirement is not unconstitutional and the ordinance was severable, we affirm.

I. Procedural History

On October 15, 2001, the village of Ottawa Hills ("village") filed a complaint for declaratory judgment against Nasrin Afjeh and her husband, Abdollah Afjeh, because the Afjehs had erected a sign on their garage door that exceeded the height and size limitation in village Ordinance No. 96-20. The sign read "WELCOME TO OTTAWA HELL – WE STILL GOT KAKISTOCRACRY." The village asked the Lucas County Court of Common Pleas to declare its sign ordinance constitutional, to enforce it against the Afjehs, and to issue an order directing the Afjehs to remove the sign. After the Afjehs filed their answer and counterclaim[1], the village filed a motion asking for a preliminary and/or permanent injunction directing the Afjehs to comply with Ordinance No. 96-20. The trial court held hearings on

[1] The issues in the appeal concern the constitutionality of Ordinance No. 96-20. The Afjehs counterclaim was voluntarily dismissed in December 2002, and therefore is not before this court.

March 15, March 22, May 10, and June 26, 2002 on the village's motion for preliminary/permanent injunction and complaint for declaratory judgment. On October 28, 2002, the trial court issued an opinion and judgment entry. The size requirement of Ordinance No. 96-20 was found to be constitutional and the height requirement portion was found to be unconstitutional but severable. The ordinance was found to be content neutral, and the Afjehs were ordered to remove the sign from their garage door and to refrain from erecting any more signs violating the ordinance.

On November 8, 2002, the village filed a motion to show cause because the Afjehs had not removed the garage door sign and had instead erected a second sign in their front yard.[2] On November 25, 2002, at a hearing, the trial court found that although a portion of the garage door was painted, the sign could still be read through the paint. The October 26, 2002 judgment entry was modified to require the

[2] Nasrin Afjeh contended that the sign had been removed since she first covered it with paper and then she painted the portion of her garage door with the message on it.

Afjehs to obliterate all remnants of the garage door sign by rendering the door a single color.[3]

Nasrin Afjeh filed a notice of appeal on November 27, 2002.[4] On December 6, 2002, the village filed a second motion to show cause regarding the second sign in the Afjehs' yard. At the December 16, 2002 hearing, the trial court denied the motion. It then reviewed whether the Afjehs had complied with its previous order to remove the sign from their garage door. The trial court determined that the "shocking or electric pink" color did not comply with its oral statement at the earlier show cause hearing to paint the garage one dark color and ordered that the garage door be repainted "one dark color."

On August 10, 2004, eight days before oral arguments, the village filed a motion to dismiss the appeal. We denied Nasrin Afjeh's request to continue oral arguments, and as she did not attend court on

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[3] The trial court declined to rule on validity of the second sign and granted the village time to file an amended complaint.

[4] Her husband did not appeal the trial court's decision.

August 18, 2004, the matter was submitted. Nasrin Afjeh filed her response to the motion to dismiss on September 22, 2004.

We will first address the village's motion to dismiss and then any portion of Nasrin Afjeh's appeal that survives.

II. Motion to Dismiss

In its motion to dismiss Nasrin Afjeh's appeal, the village argues that the appeal is moot because it enacted Ordinance 2002-18 which remedied the defect in the height provision of Ordinance 96-20 and added a severability clause. The village also contends that the appeal is moot because after filing the appeal, Nasrin Afjeh complied with the trial court's order to remove the sign, applied for and received a sign permit, and erected a new sign with the identical message.

The village's motion to dismiss is not well-taken. Amending the ordinance's height provision does not affect Nasrin Afjeh's challenge to the constitutionality of its size requirement, which was not altered by Ordinance 2002-18. The amendment also does not

address her argument that the trial court exceeded its authority when it ordered her to paint her garage door one dark color.

We also note that Nasrin Afjeh filed a "motion for leave to amend appellant's memorandum in opposition to appellee's motion to dismiss appeal to correct aninadvertent error in caption and in text." This motion is moot upon our denial of the motion to dismiss.[5]

III. The Appellate Record

Initially, we note that we do not have a complete record in this case. The trial court held hearings on March 15, March 22, May 10, and June 26, 2002. A review of the docket shows that the transcript of the May hearing was never filed with the trial court. In a judgment entry filed May 13, 2002, the trial court indicates that testimony was adduced from two witnesses on May 10, 2002. Attached as an exhibit to the village's brief regarding the severability issue is an excerpt of the May hearing containing the testimony of Walter Edelen. We do not

[5] It should be noted, however, that the amended motion still had the wrong caption. The amended motion incorrectly identified Nasrin Afjeh as plaintiff-appellant and the village as defendant-appellee.

know, however, the identity of the other witness or the content of that testimony.

Upon appeal of an adverse judgment, it is incumbent upon the party appealing the judgment to ensure that the record or whatever portions of the record are necessary for determination of the appeal are filed with the court in which review is sought. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19; App.R. 9(B) and 10(A). The duty of submitting the record falls upon an appellant because it is the appellant who bears the burden of showing error by references to matters in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. In the absence of a complete and adequate record, a reviewing court has nothing to pass upon and must presume the regularity of the proceedings and the presence of sufficient evidence to support the trial court's decision. Id.

During the pendency of this appeal, issues arose about the extent of the record on appeal. On March 14, 2003, this court issued a decision and judgment entry detailing the record before it. We noted

that there were 247 documents filed between October 15, 2001 through November 26, 2002 and listed the transcripts of proceedings and depositions that were also part of the record. We also informed Nasrin Afjeh that if she wished to supplement the appellate record, she should file a motion with the trial court pursuant to App.R. 9(E). On April 3, 2003, she filed such a motion. The trial court held a hearing on the motion and ordered the appellate record supplemented with depositions filed December 5, 2002, and December 16, 2002. It also granted her leave to compile a list of documents she wanted included. On August 28, 2003, Nasrin Afjeh filed a copy of the docket with check marks next to the documents she wanted to have included in the appellate record. One of the check-marked documents was the May 13, 2002 order with the word "transcript" written at the right hand side. The entire May 10 hearing transcript, however, was never filed with the trial court. Therefore, it is not part of the record on appeal.

Consequently, we will address those assignments of error that we can. In the absence of a complete record, we will have to assume

the regularity of the trial court's proceedings, as we must. *Knapp*, 61 Ohio St.2d at 199.

IV. Assignments of Error

"1. The court below erred in holding that the size requirement of Ordinance 96-20 was constitutional when the size requirement is unreasonable when applied to signs affixed to a building.

"2. The court below erred in holding that the size requirement of Ordinance 96-20 was constitutional when the size requirement favors commercial signs by allowing twice as much surface area for commercial speech as it allows private speech.

"3. The court below erred in holding that appellant had to paint her garage a dark color against her wishes as the right of a private owner is violated when she is deprived of her choice of color for the garage door of her private property and the scope of the remedy was unreasonable.

"4. The court below erred in holding that Ordinance 96-20 is severable when the ordinance did not have a severability clause and should be considered a single unit.

"5. The court below erred in holding that the Ordinance 96-20 is content neutral when village officials enforce said ordinance based on content."

V. Constitutionality of Size Requirement – First and Second Assignments of Error

In the first assignment of error, Nasrin Afjeh contends that Ordinance 96-20 is unconstitutional because the size requirement is unreasonable. In the second assignment of error, she alleges that the sign ordinance is unconstitutional because it is not content neutral since it favors commercial speech.

There is a strong presumption in favor of the validity of an ordinance. *Huber Hts. v. Liakos* (2001), 145 Ohio App.3d 35, 41 citing *Downing v. Cook* (1982), 69 Ohio St.2d 149, 151. A party challenging the validity of an ordinance bears the burden of demonstrating its

unconstitutionality. Id. citing *Mayfield-Dorsh, Inc. v. S. Euclid* (1981), 68 Ohio St.2d 156.

Signs are a form of speech that is protected by the First Amendment to the United States Constitution. *Ladue v. Gilleo* (1994), 512 U.S. 43, 48, 114 S.Ct. 2038, 2041, 129 L.Ed.2d 36, 42-43. The United States Supreme Court, however, has noted that because there are certain problems associated with signs, such as causing obstructed views or distracting motorists, municipalities may exercise their police powers to regulate the physical characteristics of signs. Id. When an ordinance is challenged on a First Amendment basis, the first line of inquiry is whether the regulation is content-based or content-neutral. *Davis v. Green* (1995), 106 Ohio App.3d 223, 227. If a regulation is content-based then strict scrutiny is applied to determine the constitutionality of the ordinance. *Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.* (2000), 89 Ohio St.3d 564, 567. A content-neutral regulation, however, may impose reasonable restrictions on the time, place, or manner of speech as long as the restrictions are justified

without reference to the content of the speech, are narrowly tailored to serve a significant governmental interest and leave open alternative channels for communication of the information. *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 675.

Ordinance 96-20 provides in pertinent part:

"Section 1. The purpose of this ordinance is to permit signs that will not, by virtue of their size, location, construction, or manner of display, endanger the public safety of individuals, confuse, mislead, or obstruct the vision necessary for traffic safety or otherwise endanger public health safety and morals; and to permit and regulate signs in such a way as to support and compliment land use objectives set forth in the zoning code of the Village of Ottawa Hills and to control the appearance and protect the aesthetic quality of the community and property values within the Village of Ottawa Hills[.]

"* * *

"Section 5. Signs on commercial property

"A) Permanent signs existing on commercial property on the effective date of this ordinance shall be considered pre-existing non-conforming uses and are allowable under the provisions of this ordinance.

"B) The total sign area of a sign on commercial property in existence on the effective date of this ordinance shall be the maximum amount of total area allowable on that property and shall not increase through the erection of new signs.

"C) A sign which predates this ordinance on commercial property may be modified as allowed by this ordinance so long as the total sign area does not exceed that which existed on the effective date of this ordinance.

"D) No sign on commercial property may be:

"1) Located neared than 25 feet from the intersection of 2 streets.

"2) Have a maximum height in excess of 48" above grade.

"3) Constitute a visual obstruction which may be detrimental to the public peace, health, safety or welfare.

"4) Shall not exceed 20 square feet in sign area for all signs, except as provided in

Section 5B.

"E) Only direct external lighting may be used to illuminate a sign in a commercial district. Such lighting shall not adversely impact on any neighboring property, nor shall such lighting diminish public safety in any manner.

"Section 6. Signs on residential property

"Signs erected after the effective date of this ordinance on residential property:

"1) Shall not exceed 48" in height.

"2) Shall not exceed 10 square feet in total square feet of all signs.

"3) Shall be located not nearer than 25 feet from the intersection of 2 streets.

"4) Shall not be located in the public right of way.

"5) Shall not be lighted in any manner. * * *"

Ordinance 96-20 does not limit in any way the message that may be displayed on signs in the village. Nevertheless, Nasrin Afjeh argues that the ordinance is content based because it favors commercial speech since the ordinance allows commercial property owners to erect signs twice the size as residential property owners. A close reading of the ordinance, however, reveals that it is not the content of the sign that determines which size limitation applies but how the property is zoned. Signs which contain political speech may be 20 square feet if it is on property that is used for commercial purposes. We, therefore, conclude that Ordinance 96-20 is content-neutral, and the second assignment of error is not well-taken.

Having determined that Ordinance 96-20 is content-neutral, our next inquiry is whether it imposes reasonable restrictions on the time, place, or manner which are justified without reference to the content of the speech and are narrowly tailored to serve a significant governmental interest. A city may properly regulate the time, place, or manner of speech based on goals of traffic safety and promoting

aesthetics. *Davis*, 106 Ohio App.3d at 228 citing *Metromedia, Inc. v. San Diego* (1981), 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800, 815.

Nasrin Afjeh argues that ten square feet is an unreasonable size limitation, especially when the sign is affixed to the side of a building because it does not create any further visual obstacle. The determination of whether the size limitation is reasonable depends in part on the evidence that was before the trial court. We do not have a complete transcript of all the hearings the trial court conducted on the validity of the sign ordinance; therefore, we must presume the regularity of the proceedings. The evidence that we do have indicated that the village conducted research before determining the size requirement and consulted real estate agents and contractors about the limits. Although a sign affixed to the side of a building may not constitute any further visual obstacle for drivers, it may be a visual distraction that could impact traffic safety and public safety. In addition, such signs could also negatively impact the aesthetics and

property values of the neighborhood. We, therefore conclude that the ten square feet size requirement is a reasonable restriction that serves a significant government interest. The first assignment of error is not well-taken.

VI. Garage Door Color – Third Assignment of Error

In the third assignment of error, Nasrin Afjeh argues that the trial court exceeded its authority when it ordered her to repaint her garage door one dark color. We are unable to address this assignment of error. The judgment entry finding the size requirement of Ordinance 96-20 constitutional and ordering the removal of the garage sign was entered on October 28, 2002. Nasrin Afjeh filed her notice of appeal on November 27, 2002, "from the order entered in the action Case No. CI-2001-4739 on the 28th day of October, 2002, by the Court of Common Pleas of Lucas County, Ohio." The trial court held a hearing on December 16, 2002 on the show cause motion of the village and ordered the garage painted one dark color. It is clear, therefore, that the trial court's order concerning the color of the garage door is not within

the scope of this appeal. Nasrin Afjeh has never sought to amend her notice of appeal to include the trial court's order concerning the color of her garage door. The third assignment of error is not well-taken.

VII. Severability of Ordinance 96-20 – Fourth Assignment of Error

Nasrin Afjeh contends that the trial court erred when it found that Ordinance 96-20 was severable. The trial court found that height requirement in section 6 of Ordinance 96-20 was vague and therefore was unconstitutional. It went on to hold that the height requirement was severable from the remaining portions of the sign ordinance. Nasrin Afjeh argues that because a severability clause was not included in the sign ordinance as with other ordinances, the village had intended Ordinance 96-20 to be treated as a single, non-severable unit. She further contends that since the sign ordinance was not severable, the whole ordinance should have been found to be unconstitutional and unenforceable against her garage sign.

As far back as 1880, the Supreme Court of Ohio has found that city ordinances may be severable. In *Piqua v. Zimmerlin* (1880), 35

Ohio St. 507, 511-12, it stated "The same rule applies to a by-law, or ordinance, that applies to a statute; and that is, that where the statute consists of severable and independent parts, having no general influence over one another, and a part is valid and a part is void, the part which is valid is operative, and will be carried into effect." A court must find that, standing alone, legal effect can be given to the parts which are constitutional and that the legislature intended the statute to be severable. *Middletown v. Ferguson* (Apr. 29, 1985), 12th Dist. No. CA84-04-049. In determining the legislative intent of a law or statute, courts look to the language employed and the purpose to be accomplished by the legislation. Id. Obviously, if a severability clause is included in a piece of legislation, the legislative body intended for it to be severable. The absence of a severability clause, however, does not necessarily mean that the statute or ordinance was not intended to be severable. "Unless it is evident the legislative body would not have enacted those provisions which it is empowered to do, independent of those provisions which is has no power to enact, the i nvalid part may

be severed and dropped if what remains is fully operative as a law." Id. citing *I.N.S. v. Chadha* (1983), 462 U.S. 919, 934, 103 S.Ct. 2764, 2775, 77 L.Ed.2d 317, 334.

The purpose of Ordinance 96-20 was to protect public safety, traffic safety, property values, and the aesthetic quality of the village. The language of Ordinance 96-20, however, does not suggest that the village would not have enacted the sign ordinance 96-20 in the absence of the height requirement. We, therefore, conclude that the village intended for it to be severable. In *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, the Ohio Supreme Court set forth the test for determining whether an unconstitutional provision may be severed from a statute or ordinance:

"(1) Are the constitutional and unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause of part is stricken out? (3) Is the insertion of

word or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?"

Section 6 of Ordinance 96-20 places five requirements on signs erected on residential property. Each provision is separately numbered and is capable of standing by itself. None of the requirements refer to any other provision; therefore, the elimination of the height requirement does not disrupt the regulation or enforcement of any of the other requirements. Finally, it is not necessary to insert words or terms to give effect to the rest of the ordinance. We, therefore, conclude that the height provision is severable. The fourth assignment of error is not well-taken.

VIII. Enforcement of Ordinance 96-20 – Fifth Assignment of Error

The fifth assignment of error concerns how the village enforces Ordinance 96-20. Nasrin Afjeh argues that the village enforces the ordinance based on the content of the sign. She contends that when the message is favorable to the village, it does not enforce the ordinance on signs that do not conform.

Where an act is challenged on the ground that it is unconstitutional as applied, the burden rests upon the party making the attack to present clear and convincing evidence of actions that make the ordinance void as applied. *State v. Boggs* (June 25, 1999), 1st App. Dist. No. C-980640 citing *Belden v. The Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph six of syllabus. Once again, our ability to fully review this assignment of error is hampered by the lack of a complete transcript. The evidence that is available to us indicates that the village did not apply the ordinance simply based on the content of the signs. There was testimony that signs placed in the right of way were consistently removed. In addition when the nonconformance of the school banner and the A-frame signs at Gresey field were brought to the attention of the village, the village required the school to remove the banner and to obtain a variance for the A-frames.[6] Furthermore, several witnesses testified that they told Nasrin Afjeh that she could display the same message on a sign that

[6] The school requested a variance to put up five A-frame signs. The village allowed a variance for three signs.

conformed to the physical requirements of the ordinance. We, therefore, conclude that the village did not enforce the sign ordinance based on content. The fifth assignment of error is not well-taken.

IX. Conclusion

All five of Nasrin Afjeh's assignments of error are not well-taken and are overruled. The judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, court costs of this appeal are assessed against appellant, Nasrin Afjeh.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. s/_____
JUDGE

Richard W. Knepper, J. s/_____
JUDGE

Judith Ann Lanzinger, J. s/_____
CONCUR. JUDGE

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Village of Ottawa Hills — Case No. CI-01-4739

Plaintiff

v.

Abdollah Afjeh, et al., — **OPINION AND JUDGMENT ENTRY**

Defendants — Decided: October 28, 2002

This cause comes before the Court for ruling upon a declaratory judgment filed by the plaintiff, the Village of Ottawa Hills (hereafter, Village) against the defendants, Dr. Abdollah and Mrs. Nasrin Afjeh. Upon review of the memoranda, the evidence presented at several hearings, various depositions and the applicable law, this Court grants plaintiff's declaratory judgment in part and denies it in part. The court stresses that this ruling has no bearing on the various

counterclaims of counterclaim plaintiffs-defendants, Dr. and Mrs. Afjeh, which are set for jury trial on December 16, 2002.

Procedurally, the declaratory judgment of aspect of this case seeks a determination that Ordinance 96-20 of the Village of Ottawa Hills is or is nor constitutional, and, if so, it is enforceable against the Afjehs as regards a large, sloppily lettered sign across most the breadth of the garage at their residence, 3616 West Bancroft.

On December 16, 1998 – that is more than two years before the sign in question came into being - the Village enacted an ordinance which establishes standards for erection and maintenance of signs at residences and elsewhere within the Village. Section 6 of Ordinance No. 96-20 reads:

"Signs erected after the effective date of this ordinance on residential property:

"1) Shall not exceed 48" in height.
"2) Shall not exceed 10 square feet in total square feet of all signs.
"3) Shall be located not nearer than 25 feet from the intersection of 2 streets.
"4) Shall not be located in the public right of way.

"5) Shall not be lighted in any manner."

In the declaratory judgment aspect of the complaint, the Village alleges that the Afjehs erected a sign on their garage door at their residence, and that the sign is in violation of Ordinance No. 96-20 as outlined above. It is the contention of the Village that the sign clearly exceeds 10 square feet in area, and that it also exceeds 48" in height. Moreover they claim that the Afjehs did not apply for a sign permit, nor did the Village issue a sign permit prior to the erection of the said sign. Plaintiff alleges that the sign has had and is having an adverse effect on the aesthetic quality of the community, and on property values, contrary to the thrust and purpose of Ordinance No. 96-20. This Court agrees with those contentions, and further notes that, given its size, the sign is a potential distraction to motorists on West Bancroft, which is probably the most heavily traveled and fastest-traveled roaddway in the Village.

Officials of the plaintiff Village have notified the Afjehs on several occasions to bring the sign into conformity with the dictates of

Ordinance No. 96-20. But, the Afjehs, and especially Ms. Afjeh, have obdurately refused. The Village contends that by erecting and maintaining the sign, the defendants are in violation of the subject ordinance, and that this Court invoke its equitable powers to redress the violation.

In many respects, this case stands as a sequel to a public records lawsuit brought by the "Afjeh Family" (sic) against the defendant Village of Ottawa Hills. See Afjeh Family vs. Village of Ottawa Hills, Lucas County Pleas Court case #CI 98-3731, and Sixth District Court of Appeals case #CL02-1229.

This court granted summary judgment to the Village in that earlier case (Opinion and Judgment Entry of June 26, 2002). In that opinion it was noted tah the Afjeh Family - and, for all practical purposes, Ms. Nasrin Afjeh alone - had been waging "...an intense and bitter civic and forensic war with the Village." The instant case is part of the continuation of that war, it had now entered its fifth year, and rages on largely due to the anger and intransigence of Ms. Afjeh

herself. The case has been expensive for both sides and, for Ms. Afjeh, there has been no dominion of te level of her anger and bitterness, nor any mitigation of her belief that the Village's officials and employees are hopelessly-corrupt and hve singles out her for harassment.

A quick review of the Opinion and Judgment Entry of June 26, 2002, provides some of the historical context for this case. Thus, that opinion in CI 98-3731, is attached hereto and incorporated herein by reference.

The Court is confident that Ms. Afjeh will continue to nudge, and to test the Village's tolerance. In the relatively recent past, she has added six or more shrubs/bushes, approximately at the set-back line on her property,, notwithstanding that they effectively obscure her sign to motorists headed west on Bancroft. Further in her ongoing efforts to show her contempt for the Village, she has added a white porcelain toilet bowl to the extreme west of her property (i.e., just west of the driveway). The porcelain facility appears to be functioning as a planter

of sorts, but it is also a none-too-subtle expression of the disdain Ms. Afjeh feels for the Village, its officials, and her neighbors. While perhaps effective for this purpose, it is also juvenile in the extreme.

As to the sign itself, some version of it has been visible on the face of the Afjeh garage door since early 1999, always in violation o fthe 10 square feet limitation, and always exceeding 48" in height. The sign currently reads "WELCOME TO OTTAWA HELL – WE STILL GOT KAKISTOCRACRY."[1] The sign itself is not precisely regular in shape, but it is clearly and conservatively more than double the square-foot limitation permitted buy Ordinance No. 96-20. As noted in the Opinion and Judgment of June 26, 2002, in cas #98-3731, the lettering of the sign was "deliberately slopped" across the garage door. Interestingly, the garage door, and thus the sign, is parallel to West Bancroft Street, and is set back the length of the Afjeh driveway, As a result, the sign is less visible that it would be were it more clearly lettered and placed perpendicular to the street, and at the set-back line.

[1] Kakistocracy, according to the Random House Dictionary of the English Language, Unabridged, Second Edition, means: government by the worst persons.

It could also then be viewed within normal vision range of someone driving either way on Bancroft. In this regard, it would be more visible and less distracting to a motorist.

Ms. Afjeh has argued that the lettering slopped across her garage does not constitute a "sign," as regulated by Ordinance No. 96-20. The Random House Dictionary of the English Language, Unabridged, Second Edition, defines sign in these ways (as is relevant here)

> 2. any object, action, event, pattern etc. that conveys a meaning…
> 5. a notice, bearing a name, direction, warning, or advertisement that is displayed or posted for public view …

Her argument that her kakistocracy message does not fall within these definitions is both disingenuous and specious. In the same vein, she argues that her message was not "erected," though this Court finds that the act of painting constitutes the erection of the sign.

Ordinance No. 96-20 of the Village of Ottawa Hills limits the size of signs to 10 square feet and 48" in height, as noted. Ordinance

No. 96-20 was enacted for the purpose of protecting public health, safety and morals of individuals, to regulate signs to support and complement land use objectives; and to control the appearance and protect the aesthetic quality of the community and property values within the Village (see Section 1, Ordinance No. 96-20). State and municipal governments may reasonably regulate activity in this regard as long as the restriction is viewpoint neutral, and is related to the legitimate governmental purpose. City of Forest Park v. Pelfrey (1995), 108 Ohio App.3d 1,3. Aesthetic values are a legitimate governmental purpose. Id.

It has been repeatedly stressed to Ms. Afjeh that Ordinance No. 96-20 is content-neutral, though she continues to assert that she is being singled out because of her sign's message - assertions made without documentation or proof. This Court, Councilman Jack Straub, and Mayor Youngen have all assured her of this. Indeed, she has known for months and months, that if she brought the sign into

conformity with the Ordinance, and with the exact same wording, this case would be effectively over.

The primary question before this Court, of course is the constitutionality of Ordinance No. 96-20. There is a presumption in favor of the validity of an ordinance and the burden is on the challenger to show that the Ordinance is unconstitutional beyond a reasonable doubt. State v. Renalist, Inc. (1978), 56 Ohio St.2d 276, 278. The Court in Renalist held that "when an enactment under attack is a legislative exercise pursuant to the police power, a party opposing such action must demonstrate a clear and papable abuse of that power inorder for reviewing court to substitute its own judgment for legislative direction." Id. Ms. Afjeh has not done so.

The Afjehs argue that the Ordinance No. 96-20 is unconstitutional because the height requirements is vague (See Walter Edelen[2] Deposition, page 118-121). An ordinance can be unconstitutionally vague for one of two reasons: (1) It fails to provide

[2] Walter Edelen was the director for the Toledo and Lucas County Planning Commission from 1976 until 1998. (See Edelen Deposition, page 115)

people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, or (2) it authorizes or encourages arbitrary and discriminatory enforcement. 161 Dublin, Inc. v. Ohio State Liquor Control Commission, Franklin App. No. 01AP-134, 2001-Ohio-8863.

This Court agrees with the Afjehs that the 48" height requirement in Ordinance No. 96-20 is vague because a person of ordinary intelligence would not know whether he or she would measure the 48" from the ground or from the bottom of the sign to the top. It seems clear that the Village intended the 48" height requirement to be measured from the ground. But, obviously, the Ordinance language does not so specify. Such ordinances must be strictly construed for constitutional purposes. The failure to specify could lead to the somewhat absurd possibility of an otherwise conforming sign being hoisted 30 or 40 feet in the air by some means. Nonetheless, the height requirement is not "sufficiently definite to allow a person to determine what conduct violates the ordinance or to prevent arbitrary enforcement." Village of Kelleys Island v. Joyce (2001), 146 Ohio

App.3d 92, 97. Therefore, the height requirement of Ordinance No. 96-20 is declared unconstitutional. The remainder of the provisions of Ordinance No. 96-20, however, are found to be constitutional.

Next, this Court must determine whether the unconstitutional height provision of Ordinance No. 96-20 can be severed from the remainder of the Ordinance, leaving the remainder intact. Severability of a local ordinance is a question of state law. Lakewood v. Plain Dealer Publishing CO. (1988), 486 U.S. 750, 772. Ohio uses a three-part test to determine whether the unconstitutional provisions of an ordinance may be severe from the remainder of the ordinance:

> "(1) Are the constitutional and unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected to the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislation if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and give effect to the former only?"

State ex rel. Maurer v. Sheward (1994), 71 Ohio St.3d 513, quoting Geiger v. Geiger (1927), 117 Ohio St. 451.

Plaintiff argues that Ordinance No. 96-20 is severable. The Village contends that the unconstitutional height provision of the Ordinance is severable from the constitutional provisions under the three-question severability test. First, the height provision of the Ordinance is set forth in a section of the Ordinance containing five separately numbered provisions; each capable to be read by itself and sand by itself. Second, severance of the height provision will not disrupt the Ordinance because regulation of the square footage of signs and other constitutional provisions of the Ordinance will still achieve the Village's legitimate exercise of its police power to control and regulate signs in the Village.

The Afjehs argue that the Ordinance is not severable because the Village did not intend for it to be severable. In Dorchy v. State of Kansas (1924), 264 U.S. 286, the Court held that a provision cannot be separable unless it appears that, standing alone, legal effect can be

given to it, and that the legislature intended the provision to stand if other provisions in the act were bad. Id at 290.

The Afjehs assert that the Village did not intend Ordinance No. 96-20 to be severable because it did not include a severability clause in Ordinance No. 96-20 like the Village did in Ordinance No. 78-5. The Village made a distinction between the two ordinances so the Village clearly intended Ordinance No. 96-20 to be considered as a single unit. Therefore, the Afjehs contend that it was the Village's intent that severability should be applied only to the ordinances which included severability clauses. In addition, the Afjehs' expert, Mr. Edelen, testified that the ordinance was not severable because it lacked a severability clause. This argument is simply erroneous.

After review of the severability test, this Court finds that the unconstitutional height provision of Ordinance No. 96-20 is severable from the remaining provisions. The Afjehs are enjoined from continued violation of the Ordinance No. 96-20 and must remove the sign to conform with the Ordinance. As this Court has previously

stated on several occasions, the sign ordinance is content neutral. The Afjehs may communicate the identical message set forth on the current sign on a sign which satisfies the size requirement of 10 square feet set forth in Ordinance No. 96-20, and other surviving requirements of the ordinance.

JUDGMENT ENTRY

Based upon all of the foregoing, there being no just cause for delay, this Court finds that Ordinance No. 96-20 is constitutional as ot its purpose; as to its 10 square foot limitation on area; as to the limitation on distance from intersections; and as to the set-back requirements. Therefore, it is ORDERED that Dr. and Mrs. Afjeh effect the removal of the subject sign on their garage door, and that the removal be accomplished on of before November 12, 2002. THeya re place on notice that failure to so remove the sign by the date indicated will resilt in a shoe cause hearing to determine whether they are in contempt of court. Further, it is ORDERED that the Afjehs erect no

further signs which are violative of the Ordinance 96-20, as it has herein been interpreted.

October 29, 2002

s/_____
William J. Skow, Judge